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79-862

IN THE

SUPREME COURT OF THE

UNITED STATES

ANDREW FOSTER,	)
	)
Petitioner,	)
	)
vs.	)
	)
NOBLE PEARCY,	)
	)
Respondent.	)

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF INDIANA

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PETITION FOR WRIT OF
CERTIORARI TO THE SUPREME COURT
OF THE STATE OF INDIANA

Andrew Foster, by counsel, Forrest Bowman, Jr., prays that a Writ of Certiorari issue to review the decision of the Supreme Court of the State of Indiana issued on April 3, 1979, vacating the opinion and judgment of the Court of Appeals of Indiana, and affirming the judgment of the trial court that the complaint for libel filed by petitioner herein be dismissed. A timely Petition For

Rehearing was filed with the Supreme Court of the State of Indiana on April 23, 1979, which was denied without opinion on August 27, 1979.

Opinions Below

The opinion of the Court of Appeals of Indiana is reported at 376 N.E. 2d 1205, and a copy is attached as Appendix "A". The opinion of the Supreme Court of the State of Indiana is reported at 387 N.E. 2d 446, and a copy is attached as Appendix "B". A copy of petitioner's Petition For Rehearing is attached as Appendix "C". A copy of the ruling denying petitioner's Petition For Rehearing is attached as Appendix "D".

Jurisdiction

1. The decision of the Supreme Court of the State of Indiana was entered on April 3, 1979. A Petition For Rehearing was timely filed on April 23, 1979, and

denied without opinion on August 27, 1979. Denial of the Petition For Rehearing was final by its terms.

2. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C., Sec. 1247(3), in that petitioner claims a right and privilege under the Constitution of the United States which is denied him by the opinion and judgment of the Supreme Court of the State of Indiana.

Questions Presented

Is the petitioner herein denied due process of law as guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States, when a rule of privilege constructed by the Supreme Court of the State of Indiana visits upon his status as a criminal defendant or subject of grand jury inquiry the loss of an action for defamation by a public

official for making false and malicious extra-judicial statements that petitioner was in fact guilty of the offense for which he was indicted, said rule of privilege being operative without regard to petitioner's guilt or innocence, or the ultimate disposition of the charge against him.

Constitutional And Statutory Provisions

UNITED STATES CONSTITUTION, AMENDMENT 5

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life of limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall privated property be taken for public use, without just compensation."

UNITED STATES CONSTITUTION, AMENDMENT 14, §1

"All persons, born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law, now deny to any person within its jurisdiction the equal protection of the laws."

Statement of the Case

Andrew Foster, petitioner herein filed an amended complaint for libel against Noble Pearcy, and Leroy K. New. The substance of that complaint is as follows, to-wit:

> During the year 1974, Noble Pearcy was the prosecutor of Marion County, Indiana and Leroy K. New was one of his deputies. During that year Leroy K. New presented evidence to the grand jury which resulted in the indictment of Foster for conspiring to deal illegally in narcotics. Shortly after the return of the indictment, and while New was

associated with the prosecution of it, New willfully and maliciously said and published that Foster was part of a nationwide network of heroin dealers, that he personally grossed $18,000.00 a week from illicit heroin trade, that he had been operating for several years, that the indictment was the result of a joint state-federal investigation, and that the indictment was solid and would stand up in Court.

The complaint further alleged that the foregoing statements were false, and were made by New at a time when he was the agent, associate and employee of Pearcy, and that Pearcy failed to exercise reasonable care to prevent New from making said statements.

> The complaint further alleged that a subsequent grand jury returned a report dismissing the criminal charges against Foster, characterizing the original indictment of Foster as politically motivated.

Pearcy filed a motion to dismiss the complaint on the grounds that it failed to state a claim upon which relief could be granted. The trial court granted the

motion and filed a memorandum stating that the complaint did not state a cause of action under respondent superior, and that Pearcy was immune from suit for negligent supervision of New, because his duty to supervise was a discretionary matter to which governmental immunity applied.

Upon Foster's refusal to plead over, the trial court entered judgment for Pearcy, and Foster appealed to the Court of Appeals of Indiana.

The Court of Appeals observed that the record reflected that the remarks allegedly made by New were made to a newspaper reporter. The Court went on to decide that the actions of New is making statements to the press about a pending criminal matter were an administrative

duty for which New was entitled to a qualified privilege. The Court further decided that since New was a deputy and not a mere employee, it could not be said as a matter of law that the doctrine of respondent superior did not apply, and the trial court was in error in dismissing the complaint. The Court of Appeals reversed the trial court and ordered the complaint reinstated under a theory of respondent superior.

Pearcy then filed a Petition To Transfer with the Supreme Court of Indiana, claiming that the decision of the Court of Appeals contravened the ruling Indiana precedent of Griffith v. Slinkard (1896), 146 Ind. 117, 44 N.E. 1001, which case did not deal with extra-judicial statements of a prosecutor. Pearcy claimed in his petition that all statements made by any prosecuting attorney should be subject to an absolute privilege.

The Supreme Court of Indiana granted transfer, vacated the opinion of the Court of Appeals, and reinstated the judgment of the trial court.

The Indiana Supreme Court relied in part on Imbler v. Pachtman (1976), 424 U.S. 409, 96 S. Ct. 984, 47 L. Ed 2d 128, in holding that a prosecutor has a duty to inform the public regarding cases which are pending in his office. Therefore, if New's statements were within the scope of his authority, the Court concluded that he was immure and therefore so was Pearcy.

Foster then timely filed his Petition For Rehearing, in which he raised the federal question herein presented by the language of specification five, to-wit:

> The opinion and decision of this Court denies the appellant, Andrew Foster, due process of law as guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States, in that it visits upon his status as a criminal defendant the loss of an action for defamation that he would otherwise have, without regard to his guilt or innocence, or the ultimate disposition of the charge against him.

The Petition For Rehearing was denied without opinion by a ruling of the Indiana Supreme Court entered August 27, 1979, which was final by its terms.

Reasons for Granting the Writ

The holding in Imbler v. Pachtman (1976) 424 U.S. 409, 96 S. Ct. 984, 47 L. Ed 2d 128, had the effect of denying civil redress for damages against a prosecutor to a criminal defendant whose indictment or conviction had been fraudulently procured by said prosecutor. The opinion in that case stressed the public interest involved in leaving prosecutors free from the chilling fear of lawsuits in instituting and maintaining prosecutions.

The Indiana Supreme Court has stated that there is an equivalent public interest in having the prosecutor feel free to make extra-judicial public statements about such a pending case. This proposition is totally contrary to the interests of all concerned in having criminal procedures conducted in the absence of such provocative and inflammatory remarks. In fact, the remarks attributed to the deputy prosecutor in this case clearly violate D.R. 7-107 of the Code of Professional Responsibility adopted by the Indiana Supreme Court, to-wit:

> "(B) A lawyer or law firm associated with the prosecution or defense of a criminal matter shall not, from the time of the filing of a complaint, information, or indictment, the issuance of an arrest warrant, or arrest until the commencement of

> the trial or disposition without trial, make or participate in making an extra-judicial statement that a reasonable person would expect to be diseminated by means of public communication and that relates to:
>
> * * *
>
> (6) Any opinion as to the guilty or innocence of the accused, the evidence, or the merits of the case."

Furthermore, there is a federal constitutional interest directly opposed of the Indiana Supreme Court, to-wit: that of the right of a criminal defendant to have his trial conducted in the absence of prejudicial pre-trial publicity.

The public interest claimed by the Indiana Supreme Court is also contrary to the reasoning of this Court in the case of Wolston v. Reader's Digest Association, 99 S. Ct. 2701 (1979).

A criminal defendant does have a constitutionally protected interest in not being visited with punitive or penal sanctions or consequences by reason of the mere pendency of the prosecution against him. Stack v. Boyle, 342 U.S. 1, 72 S. Ct. 1, 96 L. Ed 3 (1951); Application of Gualt, 87 S. Ct. 1428, 387 U.S. 1, 18 L. Ed 2d 527; Jackson v. Indiana, 406 U.S. 715, 32 L. Ed 435, 925 S. Ct. 1845. In this case, the opinion of the Indiana Supreme Court deprives him of an action he would otherwise have, except for his involvement as a target of the criminal justice system. In the absence of a legitimate public interest, such penalty is arbitrary without reason, and violative of due process.

The tendency of the opinion of the Indiana Supreme Court to encourage mischief in the criminal justice system and elsewhere is sufficient reason for the Court to grant the writ.

Conclusion

For all the reasons stated hereinabove, this Petition For A Writ of Certiorari to the Supreme Court of the State of Indiana should be granted.

Respectfully submitted,

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APPENDIX A

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IN THE

COURT OF APPEALS OF INDIANA

FIRST DISTRICT

ANDREW FOSTER	)	
	)	
Appellant(Plaintiff Below)	)	
	)	
vs.	)	No. 1-577-A-113
	)	
NOBLE R. PEARCY	)	
	)	
Appellee(Defendant Below).	)	

APPEAL FROM THE HANCOCK CIRCUIT COURT
The Honorable George B. Davis, Judge

ROBERTSON, J.

Plaintiff-appellant Andrew Foster instituted a civil action for defamation against defendant-appellant Noble Pearcy and Leroy New. In response, Pearcy filed a motion to dismiss under Indiana Rules of Procedure, Trial Rule 12(B) (6) for failure to state a claim for relief. This motion was ultimately granted by the trial court and judgment was entered thereon. Foster now appeals from a denial of his motion to correct errors.

The alleged defamation relevant to this appeal resulted from statements made by New in September, 1974. At that time, Pearcy was the prosecuting attorney in Marion County and New was a deputy prosecutor under him. During 1974, New participated in the presentation of evidence to the Marion County Grand Jury concerning an alleged narcotics smuggling operation. As a result of the evidence

presented by New and the prosecutor's office, Foster and others were indicted on September 6, 1974, for various narcotics offenses. In 1975, another Marion County Grand Jury dismissed all charges against Foster due to a lack of evidence.

The first of the alleged defamatory statements made by New occurred on September 7, 1974. It appears that on that date, New contacted a reporter for the Indianapolis Star to advise him of the indictment against Foster. In his complaint, Foster alleges that New made false and defamatory remarks to that reporter, including statements that (1) Foster grossed $18,000.00 per week from his heroin business; (2) Foster was part of a nation wide heroin operation; and (3) the indictment was the result of a two-month joint investigation by city and federal authorities. Foster further stated in count two of his amended complaint that New, on

September 11, 1974, made additional statements to the press that police authorities "knew the whereabouts of huge profits plaintiff (Foster) was estimated to have made during a two (2) year stint as boss of a narcotics operation."

The only issue raised by Foster on appeal is whether the trial court erred by granting Pearcy's motion to dismiss and entering judgment thereon. Foster argues that his complaint properly states a claim for relief against Pearcy under two theories: respondeat-superior and negligence in hiring and supervising New.

The trial court held that the complaint was inadequate to state a claim under respondeat-superior and that Pearcy was shielded by governmental immunity for his discretionary acts of hiring and supervising New.

Further, Pearcy argues in his brief that New's statements were made in connection with a judicial proceeding and were therefore absolutely privileged.

The law of defamation recognizes two types of privilege, absolute and qualified. The distinction between these two types of privilege is quite important. When defamatory words are spoken under circumstances giving rise to an absolute privilege, no right of action accrues to the person defamed, no matter what the intent of the speaker or whether the words were published maliciously, and the defamation action comes to an end. Conversely, where the speaker can claim only a qualified privilege, further inquiry can be made after the establishment of the privilege to determine whether the speaker has abused his privilege:

> Once the existence of the privilege is established, the burden is upon the plaintiff to prove by use of the occasion for an improper purpose, or by lack of belief or grounds for belief in the truth of what is said. Unless only one conclusion can be drawn from the evidence, the determination of the question whether the privilege has been abused is for the jury. Prosser, Law of Torts, §115, at p. 796. (Fourth Edition, 1971).

Statements made in the course of judicial proceedings have been long accorded an absolute privilege or immunity from suits for defamation under common law. This rule has been followed in numerous Indiana cases. Wilkins v. Hyde (1895), 142 Ind. 260, 41 N.E. 536; (pleadings), Hutchinson v. Lewis (1881), 75 Ind. 55; (witness), Meier v. Combs (1973), 156 Ind. App. 458, 297 N.E. 2d 436; (pleadings), Baldwin v. Hutchinson (1893), 8 Ind. App. 454, 35 N.E. 711 (witness).

In the case of Griffith v. Slinkard

(1896), 146 Ind. 117, 44 N.E. 1001, our Supreme Court extended the protection of judicial immunity to actions for libel and malicious prosecution filed against a prosecuting attorney. In that case, a prosecuting attorney presented evidence to a grand jury in order to obtain indictments against Griffith and another. When the grand jury voted to indict only the second person, and not Griffith, the prosecutor secretly altered the indictment to include Griffith's name. He then had a warrant issued for the arrest of Griffith, who was subsequently arrested by the police. The charges against Griffith were later dismissed, however, and he then sued the prosecutor for libel and malicious prosecution.

After determining that a prosecutor was a judicial officer, the Supreme Court held that he was immune from an action for malicious prosecution:

> The prosecuting attorney therefore is a judicial officer, but not in the sense of a judge of a court. The rule applicable to such an officer is thus stated by an eminent author: "Whenever duties of a judicial nature are imposed upon a public officer, the due execution of which depends upon his own judgment, he is exempt from all responsibility by action for the motives which influence him and the manner in which said duties are performed. If corrupt, he may be impeached or indicted, but he cannot be prosecuted by an individual to obtain redress for the wrong which may have been done. No public officer is responsible in a civil suit for a judicial determination, however erroneous it may be, and however malicious the motive which produced it". Townsend Slander and Libel (3rd. Ed.), §227, pp. 395-6. 146 Ind. at 121, 122.

The court further held that the prosecutor's reading of the false indictment in open court was absolutely privileged and could not be the basis of an action for defamation:

> And it makes no difference whether the charge be true or false; or whether it be sufficient to effect its object or not; if it be made in the due course of a legal or judicial proceeding, it is privileged, and cannot be the foundation of an action for defamation. 146 Ind. at 123.

The United States Supreme Court cited and discussed Griffith in the recent case of Imbler v. Pachtman (1976), 96 S.Ct. 984. In Pachtman, an action was filed against a state prosecutor under 42 USC 1983, alleging that the prosecutor had conspired to unlawfully charge and convict Imbler of murder. The Supreme Court first noted that the common law immunity had previously been allowed to legislators and judges in actions under §1983, Tenney v. Brandhove (1951), 341 U.S. 367, 71 S. Ct. 783, 95 L.Ed. 1019; Pierson v. Ray (1967), 386 U.S. 547, 87 S. Ct. 1213, 18 L.Ed.

2d 288, and also to federal prosecutors in actions for malicious prosecution. Yaselli v. Goff (2nd. Cir. 1926), 12 F.2d 396, affd. per curiam 275 U.S. 503. The Supreme Court further stated that the holding in Griffith had become "the clear majority rule" on the issue of a prosecutor's immunity.

The Supreme Court then stated that the similarity in the duties and function of a prosecutor with that of a judge justified the extension to that office of the judicial immunity deeply rooted in our common law:

> Courts that have extended the same immunity to the prosecutor have sometimes remarked on the fact that all three officials--judge, grand juror, and prosecutor--exercise a discretionary judgment on the basis of evidence granted to them. Smith v. Parman, 101 Kan. 115, 165 P. 663 (1917); Watts v. Gerking, 111 Ore. 641, 222 P. 318 (1924). It is the functional comparability of their judgments to those of the judge that has resulted in both grand jurors and prosecutors being referred to as "quasi judicial" officers, and their immunities being termed "quasi judicial"

as well. 96 S.Ct. 991, note 20.

Further, the immunity given to prosecutors is based on similar public policy considerations - the concern about harassment from unfounded litigation that could deflect the prosecutor's time and energy from his public duties and that the threat of such litigation could prevent him from exercising the independent judgment which is necessary to carry out his official duties. The Supreme Court concluded that an absolute privilege, rather than a qualified privilege, from actions under 42 USC 1973 was necessary. However, the court expressly refused to consider whether the immunity should be extended to a state prosecutor while acting as an investigative or administrative officer rather than as an advocate.

It seems clear, then, that the real issue here is whether the acts and words of New fall within the scope of the traditional judicial privilege so as to exempt New and Pearcy from liability.

A statement is made in Prosser, Law of Torts, (4th Ed. 1971), that statements made in a press conference are not covered by judicial immunity:

> It is clear, however, that statements given to the newspapers concerning the case are no part of a judicial proceeding, and are not absolutely privileged, Prosser, Law of Torts, §114, p. 781.

The authority cited for that quote is the case of Kennedy v. Cannon (1962), 229 Md. 92, 182 A.2d 54, In Kennedy, an attorney was defending his client against a charge of rape. In the course of his defense, the attorney

made statements to the press indicating that the victim had in fact consented to the rape. The attorney was sued by the victim for defamation, and the court on appeal held that the attorney could claim no privilege:

> The term "judicial proceeding" is broad enough to cover all steps in a criminal action . . . However, this does not necessarily mean that every statement made by an attorney after the inception of a judicial proceeding will be privileged. 182 A.2d at 57.

It seems that the Restatement (Second) of Torts would take a view similar to that expressed by Prosser, and hold that a statement made in a press conference by a prosecuting attorney would bear only a qualified privilege, not an absolute privilege. Section 585 of the Restatement sets out the basic doctrine of judicial immunity as applied to a person

acting in the capacity of judge. This absolute privilege is then carried over to attorneys, including prosecuting attorneys, in section 586:

> An attorney at law is absolutely privileged to publish defamatory matter concerning another in communications preliminary to a proposed judicial proceeding, or in the institution of, or during the course and as a part of, a judicial proceeding in which he participates as counsel, if it has some relation to the proceeding.

The extent of this attorney's privilege is expanded only slightly in section 586, as seen in the following portion of Comment a:

> An attorney at law is absolutely privileged to publish defamatory matter concerning another in communications preliminary to a proposed judicial proceeding, or in the institution of, a judicial proceeding in which he participates as counsel, if it has some relation to the proceeding.

The extent of this attorney's privilege is expanded only slightly in section 586, as seen in the following portion of Comment a:

> The publication of defamatory matter by an attorney is protected not only when made in the institution of the proceedings or in the conduct of litigation before a judicial tribunal, but in conferences and other communications preliminary to the proceeding. The institution of a judicial proceeding includes all pleadings and affidavits necessary to set the judicial machinery in motion. The conduct of the litigation includes the examination and cross examination of witnesses, comments upon the arguments both oral and written upon the evidence, whether made to court or jury.

Analysis of other sections of the Restatement, however, seem to suggest that a prosecutor in the present situation could not claim an absolute judicial privilege, but rather must claim a qualified immunity. In §591, the absolute privilege for federal officials and some state officials is set out:

> An absolute privilege to publish defamatory matter concerning another in communications made in the performance of his official duties exists for
>
> (a) any executive or administrative officer of the United States; or
>
> (b) a governor or other superior executive officer of a state.

This section embodies the doctrine, for federal officials, set out in Barr v. Matteo (1959), 360 U.S. 564, 79 S.Ct. 1335, 3 L.Ed.2d 1434. However, while recognizing that some states have extended this absolute privilege to all state officials, the Restatement suggests that the general rule would hold that only cabinet level state officials may claim absolute immunity, while inferior officers would be limited to a qualified immunity. Illustrations 3 and 4 to section 591 would apply this to prosecuting attorneys:

> 3. A, the attorney general of State X, issues a press release explaining the delay of his office in prosecuting

certain offenses against the State, in the course of which he accuses B of suppressing evidence that might lead to a conviction. A is absolutely privileged, and is not liable to B.
4. The same facts as in Illustration 3, except that A is not Attorney General, but is a local district attorney. A. has only a conditional privilege, as stated in §598A, even if it is found that the press release is within the scope of his official duties.

The qualified privilege under §598A to which reference is made above reads as follows:

> An occasion makes a publication conditionally privileged if an inferior administrative officer of a state or any of its subdivisions who is not entitled to an absolute privilege makes a defamatory communication required or permitted in the performance of his official duties.

The policy considerations of granting an absolute privilege to the acts of a judicial or quasi-judicial officer are well stated in the case of Schulze v. Coykendall (1976), 218 Kan. 653, 545 P. 2d 392:

> Absolute privilege is recognized in cases where the public service or the administration of justice requires complete immunity as in legislative, executive or judicial proceedings, the occasion for the immunity being not so much for those engaged as for the promotion of the public welfare. 545 P.2d at 398.

In the present case, a rather difficult policy question is presented. It cannot be disputed that the public has a vital interest in being well informed of the criminal investigations and charges emanating from the prosecutor's office. It seems equally certain that the prosecutor, or his staff of deputies, has an affirmative duty to inform the public of the actions taken by that office. Naturally, one of the more efficient methods of performing that duty is the use of press releases to the news media. Equally compelling, however, is the right of each citizen to be secure in his reputation and to be free from malicious and

unwarranted attacks on his character.

The absolute immunity accorded judicial officers has traditionally been linked with those actions and words which a re an intrinsic part of the judicial process, such as conduct during trials, pre-trial hearings and conferences, pleadings, etc., and in the case of a prosecutor, the decision whether or not to institute criminal proceedings. This protected conduct generally occurs within the framework of the traditional adversary proceeding where public policy demands that each litigant be free to fully and freely express his views without any fear or threat of retribution by another disgruntled participant. In such a situation, where the rights or liberties of a citizen are directly at stake, the possibility that some bit of relevant evidence or cogent argument might be suppressed through

fear of a retaliatory civil action justifies the loss of civil remedy which is occasioned by the doctrine of absolute judicial immunity. We do not feel, however, that the administrative duty of a prosecutor to inform the public falls within the ambit of this type of judicial function for purposes of the application of the traditional absolute immunity. We further believe that no substantial threat to the right to free and full disclosure of government business to the public will be posed by a refusal to expand the traditional qualified privilege covering such statements to an absolute immunity. We hold, therefore, that the statements made by New in 1974 which are alleged to be the basis of liability for New and Pearcy are covered by a qualified privilege in this action for libel and

slander and not by an absolute judicial privilege as was held by the trial court.

It should be noted that our holding in this case does not mean that an actionable defamation may be found by merely proving that the statements were in fact false or inaccurate, even if made negligently. Foster still carries the burden of overcoming the qualified privilege by showing that the statements were spoken maliciously and that New abused the privilege. See Knight v. Baker (1977), __ Ind. App. ___, 363 N.E. 2d 1048; Patten v. Smith (1977), ___ Ind. App. ___, 360 N.E. 2d 233.

Having found that New may claim a qualified privilege rather than an absolute immunity, we must now determine whether the trial court correctly decided that Foster's complaint failed to state a claim for relief under the general doctrine of respondeat-

superior--that Pearcy is liable for the acts of his agent New.

The standard to be used in ruling on a TR 12(B) (6) motion was stated by the Supreme Court in State v. Rankin (1973), 260 Ind. 288, 294 N.E. 2d 604:

> This Court has noted that in a typical 12(B) (6) situation, a complaint is not subject to dismissal unless it appears to a certainty that the plaintiff would not be entitled to relief under any set of facts. (Citations omitted). The rules do not require that the complaint state all the elements of a cause of action. (Emphasis in original). 294 N.E. 2d at 606.

Although we have not been blessed by any citation of authority on this question by the briefs filed in this appeal, it can be stated as the general rule that a government officer is not liable for the acts of other government employees that work for or under him. Salem Bank & Trust Co. V. Whitcomb (1977), ___ Ind. App. ___, 362 N.E. 2d 1180. However, an exception to this general rule holds

that an officer may be vicariously liable for the acts of his deputies, as distinguished from other subordinate employees or assistants. IC 1971, 5-6-1-1, IC 1971, 5-6-1-3; Salem Bank & Trust Company v. Whitcomb, supra.

Foster's complaint alleges that New, a deputy prosecutor under Pearcy, made statements which were defamatory to Foster in the course of his employment and as a representative of Pearcy. Since we have decided that New may claim a qualified rather than an absolute privilege, it is certainly possible that Foster could prove a set of facts to support his claim for relief against New and Pearcy. Therefore, it was error to dismiss the complaint for failure to state a claim for relief under a theory of respondeat-superior.

Foster lastly argues that Pearcy could be liable in negligence for failing to

properly supervise New. Again, however, Foster has failed to cite any authority or present any reasoning to support his argument, other than quoting the standard to be used in ruling on a TR 12(B) (6) motion.

It has long been the common law rule in this state that a government employee or official who is performing a discretionary function enjoys a qualified privilege and will not be held liable for mistake or errors in judgment while exercising that discretion. Wallace v. Feehan (1934), 206 Ind. 522, 190 N.E. 438; Board of Commissioners of Delaware County v. Briggs (1975), ___ Ind. App. ___, 337 N.E. 2d 852; Adams v. Scheidner (1919), 71 Ind. App. 249, 124 N.E. 718. This qualified privilege for discretionary acts was recently codified by the enactment of the Indiana Tort Claims Act, IC 1971, 34-4-16.5-3

(6). (effective February 19, 1974).

Foster's complaint does not allege any willful or malicious conduct by Pearcy nor does it allege any unauthorized acts by Pearcy. It merely alleges that Pearcy was negligent in failing to properly supervise New in the performance of his duties. The supervision of deputies and employees constitutes a discretionary function and is therefore covered by the qualified privilege. Because Foster made no allegation that Pearcy in any way abused this privilege, the trial court properly held that the complaint failed to state a claim for relief against Pearcy for negligence.

This cause is reversed and remanded with instructions to reinstate Foster's complaint as to his claim for relief under a theory of respondeat-superior.

Reversed and remanded.

Lybrook, P.J. and Lowdermilk, J., concur.

APPENDIX B

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IN THE

SUPREME COURT OF INDIANA

ANDREW FOSTER, Appellant,	)	
vs.	)	Court of Appeals No. 1-577 A 113
NOBLE PEARCY, Appellee.	)	Supreme Court No. 479 S 87

APPEAL FROM THE HANCOCK CIRCUIT COURT
The Honorable George B. Davis, Judge

GIVAN, C. J.

Appellant filed this cause of action for libel against Leroy New and appellee

Noble Pearcy. Pearcy moved to dismiss under TR 12 (B)(6) for failure to state a claim upon which relief could be granted. The trial court granted the motion. The Court of Appeals reversed, holding that Pearcy as Prosecuting Attorney enjoyed only a qualified immunity for statements made to the press by him and his deputy Leroy New. Foster v. Pearcy (1978) ___ Ind. App. ___, 376 N.E. 2d 1205. We grant transfer and reinstate the judgment of the trial court.

In 1974 Pearcy was Marion County Prosecuting Attorney and New was a deputy under him. During that year New presented evidence to the Marion County Grand Jury regarding an alleged narcotics smuggling ring. The grand jury returned an

indictment against appellant Andrew Foster and others. The indictments were later dismissed because of procedural technicalities. A resubmission to the grand jury resulted in a no bill.

On September 7, 1974, according to the complaint, New told a reporter for the Indianapolis Star (1) that Foster had grossed $18,000 per week from his herois business; (2) that Foster was part of a nationwide heroin ring; and (3) that the indictment was a result of a two-month investigation by local and federal authorities. New is also alleged to have stated on September 11, 1974, that the police knew the location of huge profits Foster had made during a two-year stint as the boss of the operation.

Foster argued to the Court of Appeals that his complaint stated a valid cause of action against Pearcy under theories of respondent superior and negligence in hiring and supervising New. The Court of Appeals accepted the former and rejected the latter. We reject both theories.

In 1896, this Court considered a case wherein a prosecuting attorney, in contravention of the grand jury's decision not to indict one Griffith, had secretly altered the indictment to include Griffith's name. Griffith subsequently was arrested but the charges were later dismissed. He then instituted an action against the prosecutor for libel and malicious prosecution. A unanimous Court stated:

"The prosecuting attorney therefore is a judicial officer, but not in the sense of a judge of a court. The rule applicable to such an officer is thus stated by an eminent author:

'Whenever duties of a judicial nature are imposed upon a public officer, the due execution of which depends upon his own judgment, he is exempt from all responsibility by action for the motives which influence him and the manner in which said duties are performed. If corrupt, he may be impeached or indicted, but he cannot be prosecuted by an individual to obtain redress for the wrong which may have been done. No public officer is responsible in a civil suit for a judicial determination, however erroneous it may be, and however malicious the motive which produced it.' Townsend Slander and Libel (3d ed.), section 227, pages 395-6."
Griffith v. Slinkard (1896) 146 Ind. 117, 121-2, 44 N.E. 1001, 1002.

The reasons for this rule were set forth by Judge Dewey in Hartsock v. Reddick (1842) 6 Blackf. 255:

"There are several occasions, on which words may be spoken or written, that destroy the implication of malice, which would otherwise arise from the words themselves. Among these privileged occasions is a proceeding in due course of law. A qualified magistrate, for the purpose of enforcing justice against an individual therein accused of crime, does not subject the person making the foundation of this principle is the necessity of preserving the due administration of public justice. Few would be found to accuse, if the institution of an unsuccessful prosecution subjected the prosecutor to an action for words spoken or written. Cutler v. Dixon, 4 Rep., 14; Lake v. King, 1 Saund., 131; Johnson v. Evans, 3 Esp. R., 32.(1) And it makes no difference whether the charge be true or false; or whether it be sufficient to effect its object or not be the foundation of an action for 6 Blackf. at 255-6.

The Supreme Court of the United States recently had occasion to address this issue in the case of Imbler v. Pachtman (1976)

424 U.S. 409, 96 S. Ct. 984, 47 L. Ed. 2d 128. The Court characterized the problem as follows:

> "Petitioner focuses upon the 'quasi-judicial' characterization, and contends that it illustrates a fundamental illogic in according absolute immunity to a prosecutor. He argues that the prosecutor, as a member of the executive branch, cannot claim the immunity reserved for the judiciary, but only a qualified immunity akin to that accorded other executive officials in this Court's previous cases.
>
> "Petitioner takes an overly simplistic approach to the issue of prosecutorial liability." 424 U.S. at 420-1, 96 S. Ct. at 990, 47 L.Ed.2d at 138.

After discussing Griffith v. Slinkard, supra, the Court stated that the "Griffith view on prosecutorial immunity became the clear majority rule on the issue." 424 U.S. at 422, 96 S. Ct. at 991, 47 L.Ed.2d

at 138. While the Court refused to decide whether immunity under 42 USC §1983 (1976), should be accorded to a prosecutor while acting in an investigative or administrative capacity, the Court did hold that the prosecutor enjoys absolute immunity for his official actions as the State's advocate.

It is our view that the reasoning of Slinkard v. Griffith, supra, and Imbler v. Pachtman, supra, should not be limited to the cases where the prosecutor is acting only as the State's advocate in a court of law. The prosecutor, as an elected law enforcement official, has a duty to inform the public regarding cases which are pending in his office. He must be able to exercise his best judgment, independent of other irrelevant factors, in serving

as the State's advocate and in communicating such developments and events to the public. Were a prosecutor granted only a qualified immunity, the threat of lawsuits against him would undermine the effectiveness of his office and would prevent the vigorous and fearless performance of his duty that is essential to the proper functioning of the criminal justice system. "The public trust of the prosecutor's office would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages." Imbler v. Pachtman, supra, 424 U.S. at 424-5, 96 S. Ct. at 992; 47 L.Ed.2d at 140.

We have considered the various authorities discussed in the opinion of the Court of Appeals. We are convinced however that they disregard the fact that the prosecuting attorney is duty-bound to keep the public informed as to the activities of his office. In the opinion of the Court of Appeals, 366 N.E. 2d at 1209, they set out illustrations numbered 3 and 4, to the RESTATEMENT (SECOND) OF TORTS §591 (1977), which purport to show a distinction between an attorney general and a local district attorney, so far as immunity is concerned. We do not accept this distinction. Both the Attorney General of Indiana and the local prosecuting attorneys in this State exercise certain sovereign powers. I would be

anomalous indeed to hold that the attorney general enjoys an absolute privilege, while the local prosecuting attorneys have only a conditional privilege for the same conduct. We therfore conclude that since it is a prosecutor's duty to inform the public as to his investigative, administrative and prosecutorial activities, the prosecutor must be afforded an absolute immunity in carrying out these duties.

While we base our decision primarily on the common law immunity traditionally accorded to prosecuting attorneys, we also note that the duty to inform the public can be characterized as a discretionary function and thus would fall within the absolute immunity granted under the Indiana Tort Claims Act. IC §34-4-16.5-3(6) [Burns Supp. 1978]. This decision will insure

that the prosecutor will be able to exercise the independent judgment necessary to effectuate his duties to investigate and prosecute criminals and to apprise the public of his activities. It will also allay the apprehensions about harassment of prosecuting attorneys from unfounded litigation which deters public officials from their public duties. At the same time, our decision will not leave actual and potential criminal defendants wholly unprotected from unscrupulous prosecuting attorneys. As the Court noted in the Pachtman case, supra, prosecutors are still subject to professional discipline if their actions stray beyond the bounds of ethical conduct. See Code of Professional Responsibility, D.R. 7-103, D.R. 7-107, E.C. 7-13 and E.C. 7-33.

We express no opinion as to the liability of prosecuting attorneys or their deputies for acts outside the scope of their authority. We hold only that where, as here, the acts are reasonably within the general scope of authority granted to prosecuting attorneys, no liability will attach.

Hence, appellee Noble Pearcy as Marion County Prosecuting Attorney enjoys absolute immunity from liability for statements made by him or his deputies to the press regarding pending cases in his office. As far as Pearcy is concerned it is immaterial whether New's statements were within or beyond the scope of his authority as a deputy. If the statements

were beyond the scope of New's authority, Pearcy again cannot be liable, as government officers are responsible only for the official acts of their deputies acting within the scope of their authority. IC §5-6-1-3 [Burns 1974]; Boaz v. Tate (1873) 43 Ind. 60. Consequently the trial court committed no error in rejecting the theory of respondent superior and thereby dismissing the complaint against Pearcy.

Foster's other contention is that the complaint states a claim for relief on the ground that Pearcy was negligent in hiring and supervising New. As the Court of Appeals stated, it is a well-settled common law and now statutory rule in this State that a government employee or official who has discretionary functions enjoys immunity for acts within the

scope of his employment and will not be held liable for any errors, mistakes of judgment or unwise decisions he may make in the exercise of that discretion. Wallace v. Feehan (1934) 206 Ind. 522, 190 N.E. 438; IC §34-4-16.5-3(6) [Burns Supp. 1978]. Clearly the employment and supervision of deputies and employees in governmental offices, including the prosecutor's office, is a discretionary function. As such the trial court and the Court of Appeals properly held that the complaint failed to state a claim for relief against Pearcy for negligence.

Accordingly, we grant transfer, vacate the opinion of the Court of Appeals and affirm the judgment of the trial court.

DeBruler, Hunter, Pivarnik and Prentice, JJ. concur.

APPENDIX C

IN THE

SUPREME COURT

OF INDIANA

Court of Appeals
NO. 1-577 A 113

Supreme Court
NO. 479 S 87

ANDREW FOSTER, Appellant (Plaintiff Below),	)	Appeal from the Hancock Circuit Court
vs.	)	
NOBLE PEARCY, Appellee (Defendant Below).	)	The Honorable George B. Davis, Judge

PETITION FOR REHEARING

Comes now the appellant, by counse, and moves the Court for a rehearing herein, for each of the following reasons, to-wit:

1. The opinion of the Court erroneously fails to acknowledge all of the alleged defamatory statements of Leroy K. New while acting as agent of Pearcy, which statements are set out as follows, to-wit:

> "A. That Andrew Foster personally grossed about $18,000.00 a week from illicit heroin trade.
>
> B. That Foster's narcotics operation was part of a nationwide network of major heroin dealers employing thousands of pushers and junkies and netting millions of dollars.
>
> C. That Foster had been operating for several years.
>
> D. That Foster's territory ranged across the near-Northside and his netowrk of lieutenants, dealers and pushers distributed and sold heroin brought in from Phoenix, Arizona, Detroit, Michigan, Chicago, and Gary.
>
> E. That the indictment of Foster was the result of a two month investigation consisting of the combined effort of a ten man squad of

> city narcotics agents headed by Lt. John R. Offut working with agents of the Federal Drug Enforcement Administration.
>
> F. That the indictment was solid and would stand up in Court with no problem. That it was not the sort of thing where some junkie who needs a break puts a man down. That the information had all been corroborated and would hold.
>
> G. At the same time and place as alleged in paragraph 4 above, the defendant Leroy K. New did wilfully and maliciously say and publish of and concerning the plaintiff Andrew Foster the following false and defamatory statement, to-wit:
>
> > 'Look, these weren't like the Churchill raids; this is an allout frontal attack being waged by the Federal government, the city police, and our office and it will hold.'"

2. The opinion of the Court erroneously concludes that it is a part of the duties of a prosecuting attorney to make extra judicial statements about the merits of pending criminal cases and the character and activities of criminal defendants.

3. The opinion of the Court erroneously fails to recognize the difference in the duties between an attorney general and a prosecuting attorney.

4. The opinion of the Court erroneously concludes that the public has an interest in encouraging prosecuting attorneys to make public statements that the Code of Professional Responsibility adopted by this Court forbids them to make.

5. The opinion and decision of this Court denies the appellant, Andrew Foster, due process of law as guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States, in that it visits upon his status as a criminal defendant the loss of an action for defamation that he would otherwise have, without regard to his guilt or innocence, or the ultimate disposition of the charge against him.

Respectfully submitted,

FORREST BOWMAN, JR.
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APPENDIX D

STATE OF INDIANA

Clerk of the Supreme Court
and Court of Appeals

Marjorie H. O'Laughlin
217 State House

No. 479S87

Andrew Foster v. Noble Pearcy

You are hereby notified that the Supreme Court has on this day - Appellants Petition for Rehearing is Denied without Opinion.

Givan, C.J. All Justice Concur.

27th day of August, 1979